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EFFECT OF THE ANSWER IN EQUITY OF A CORPORATION.—Where, to a bill in equity against a corporation, the defendant files an answer under its corporate seal, the truth of the facts contained therein being verified by the oath of one of the officers of the corporation, who has knowledge of the facts, does the answer come within the rule of equity which allows it to be overcome only by the testimony of two witnesses, or of one witness with corroborating testimony, or is the answer mere pleading, having the effect only to place the facts in issue? In *Kane* v. *Schuylkill Fire Insurance Co.*, 199 Pa. 198 (1901), the Supreme Court of Pennsylvania lays down the former proposition, *viz,* that the answer of a corporation is as fully protected by the rule as the answer of an individual, and therefore can be overcome, if at all, only by the testimony of two witnesses or of one witness, with corroborating circumstances.

Where the defendant is a natural person, the applicability of the rule is admitted in all jurisdictions; in fact it has existed in England from the earliest times, as is well shown by the interesting discussion contained in the report of the referee in *Kane* v. *Ins. Co., supra.* It is only where it has been applied to the case of a corporation defendant that there has been any divergence of opinion, and, even then, a close examination of the authorities discloses very little conflict.

Answers of corporations in equity may be divided into two classes: those which are merely under the corporate seal, unsupported by oath; and those which are verified by the oath of an officer who is cognizant of the facts, to the truth of which he swears. Answers of the first class—those which are unsupported by oath—have almost uniformly been regarded as mere pleading and as not within the equitable rule: *Union Bank* v. *Geary,* 5 Pet. 111; *Lovett* v. *Saw Mill Association,* 6 Paige (N. Y.) 54 ( ); *Iron Co.* v. *Wingert,* 8 Gill (Md.) 170 ( ); *Bouldin* v. *Baltimore,* 15 Md. 18 ( ); and the text writers are to the same effect: Langdell's Eq. Pl., §78; Brightley's Eq., §686; Cooper's Eq. Pl., p. 325; Story's Ep. Pl., §874; 2 Daniels Chan. Prac., §843; Mitford's & Tyler's Eq. Pl., p. 107; 1 Am. and Eng. Encyc. of Pleading and Prac., p. 956.

It is when we come to examine the authorities of the second class,—those in which the corporation's answer is verified by the affidavit of an officer,—that we find some difference of opinion. This seems to have arisen, chiefly, from the habit of courts from imagining that an authority lays down the proposition that it is impossible for the answer of a corporation to have the same effect as the answer of an individual, when, in reality, all that the authority decides is that an answer not under oath does not have the effect of an answer under oath, without even considering the question of the capacity of a corporation to answer under the oath of one of its officers, or the effect of such an answer. But even when this distinction has been called to the courts' attention, it has not always prevailed, as will be seen from a glance at the decisions.

The leading case upon the subject is *Carpenter* v. *Provident Ins. Co.,* 4 Howard, 185, a decision of the Supreme Court of the United States. A bill in equity was filed against an insurance company, and a responsive answer was filed under the corporate seal, sworn to by the president, who was not such at the time of the alleged transaction, but who had access to the records of the corporation. The truth of the averments of the answer was verified by the president "according to the best of his knowledge and belief." The Supreme Court of the United States held that the answer could not be overthrown by the testimony of one witness, and affirmed a decree in favor of the defendant, Mr. Justice Woodbury saying (p. 218):

"It has been adjudged in *Solomon* v. *Cladgett,* 3 Bland, 141, 165, that the answer of a corporation if called for by the bill, and it is responsive to the call, though made by a corporation aggregate by its seal and not under oath, is competent evidence, and cannot be overturned by the testimony of one witness alone. We do not go to this extent, but see no reason why such an answer, by a corporation, under its seal and sworn to by a proper officer, with some means of knowledge on the subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness (5 Pet. 111, 4 Wash. D. C., 601.) Here the denial by the corporation is explicit and responsive to the bill, and its truth sworn to by its president, according to his best knowledge and belief."

The rule was again applied in *Hayward* v. *Eliot Nat. Bank,* 4 Clifford, 294, where, on a bill in equity against a national bank, the defendant filed an answer, sworn to by its officers. Clifford, J., held the answer to be conclusive, saying (p. 296):

"Repeated decisions of the Supreme Court have established the rule that an answer responsive to the allegations of the bill, if it have respect to matters within the knowledge of the pleader and be duly sworn to, must be taken to be true, unless disproved by two witnesses, or by one witness and corroborating circumstances which give the opposing testimony greater weight than the answer. Unsworn answers do not have that effect, but if the answer be duly sworn to, even though the suit be against a corporation, and the oath be by one of its principal officers, the answer will have that effect if it be responsive to the bill, and be clear and positive in its terms."

In Pennsylvania, prior to the decision in *Kane* v. *Ins. Co., supra,* a ruling had apparently been made upon the question in *Waller* v. *Kingston Coal Co.,* 191 Pa., 193, in which case a bill in equity for an account was filed against a corporation, whose answer, under the corporate seal, was verified by its secretary in the following words: "* * * * being duly sworn, says that the facts set forth in the following answer, so far as they are stated upon his own knowledge are true, and so far as they are stated upon information, he verily believes to be true." (This affidavit is set out in the paper book of the appellant in that case, p. 86.) Judge Albright, in the court below, held that the answer could be overcome only by the testimony of two witnesses, or of one witness and corroborating circumstances, saying:

"I fail to find any evidence supporting plaintiff's contention in those regards, much less the amount of proof required to overcome such denial. Such answer is conclusive in defendant's favor unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts which give to it a greater weight than the answer or which are equivalent in weight to a second witness."

On an appeal by the plaintiff, the Supreme Court of Pennsylvania, *per curiam,* affirmed the decree, saying:

"This record discloses no substantial error in any of the learned court's rulings, findings of fact or conclusions of law drawn therefrom."

But it should be remembered that there is no reason to apply an individual defendant, where the officer making the affidavit does not possess personal knowledge of the facts, to the truth of which he swears. Since the answer, even of an individual, would, under these circumstances, have merely the effect of pleading, and no force whatever as evidence (*Bussier* v. *Weekey,* 11 Pa. Super. Ct., 463), the attention of the court in the case of a corporation defendant is immediately directed to the inquiry, as it would be in the case of an answer by an individual: "Did or did not the officer have personal knowledge of the facts to which he swears?" One of the latest utterances upon the subject is in *Savings & Loan Ass'n.* v. *Davidson,* 97 Fed., 696, where the United States Circuit Court of Appeals (Ninth Circuit) denied the conclusiveness of the answer solely upon the ground that the officer making the affidavit did not have personal knowledge of the facts, and admitting the applicability of the rule in a case similar to *Kane* v. *Ins. Co., supra.* Other decisions to the same effect are *Reijel* v. *Am. Life Ins. Co.,* 153 Pa., 134, and *Gantt* v. *Cox & Lous. Co.,* 199 Pa., 208.

A question, analogous to the one under discussion, is raised where, after a preliminary injunction has been granted against a corporation, the latter files an answer denying the equity of the bill. It was at first thought that a mere answer under the corporate seal would have the effect of dissolving the injunction, but now it is well settled that it is only where the answer is sworn to by an officer with knowledge of the facts that this result follows, and courts are unanimous in ascribing such a result to an answer so verified. See *Haight* v. *Morris Aqueduct,* 4 Washington C. C., 605; *Fulton Bank* v. *Canal Co.,* 1 Paige (N. Y.) 311; *Hogan* v. *Bank,* 10 Ala., 485; *Griffin* v. *Bank,* 17 Ala., 258.

But the contrary doctrine that the answer of a corporation, whether supported by the oath of an officer or not, has no weight as evidence, but is merely pleading, has been asserted by the courts of Michigan and Tennessee. In *Beecher* v. *Anderson,* 45 Mich., 543, there was an application for a mandamus upon the sheriff, commanding him to serve a warrant of arrest for perjury upon an officer of a corporation, the alleged perjury being contained in affidavit of the officer in support of an answer in equity of the corporation. It was contended upon behalf of the defendant that there was no perjury, since the affidavit of the officer could by no possibility affect or give weight to the answer of the corporation, and the court sustained this contention, saying: "The oath of W. [the officer] to the answer was wholly an

idle ceremony. The answer was no better with it than without it; it affected the issue in no manner whatever; it strengthened no statement made in the answer, and it made no statement evidence that would not have been evidence without it, and gave no statement weight or force that it would not otherwise have possessed." Also in *Van Wych* v. *Worrell,* 2 Humph. (Tenn.) 192, an answer of a corporation, supported by the oath of its secretary, who had knowledge of the facts, was treated as mere pleading. See, also, Langdell's Equity Pleading, §78.

Upon principle, there is no reason why the answer of a corporation, supported by the affidavit of an officer, should not stand upon the same plane as the answer of an individual. As was said by Mr. Justice Mitchell in *Kane* v. *Ins. Co., supra,* "It is said that a corporation cannot answer under oath, but only under seal. This is conceded, but it is purely technical. A corporation can only act through the persons of its officers or other agents. Its corporate seal is not action, but only evidence of action by the proper officers." A corporation, when it receives its charter, becomes a person in the eyes of the law, and is entitled to hold the title to its property in the same manner as an individual. In a court of law all statements of claim, affidavits of defence, answers to interrogatories, etc., are effective only when under oath; and in the case of a corporation the oath taken by one of the officers is universally recognized as imparting to the instrument executed by the corporation the same effect as the oath of an individual would give to an instrument executed by him. Should a different rule be applied to the corporation's answer in equity? Is the corporation to be fully recognized by a court of law, but, when it comes into a court of equity, to be deprived of one of the safeguards which equity places about property, and be unable to protect its property in a case where an individual defendant would have the power? The objection to granting this right to a corporation is, perhaps, the last instance of the survival of the ancient doctrine that a corporation has no soul, a doctrine which, however correct in fact, has, by the present time, been completely abandoned by the courts.

A. E. W.

SALE OF AN ARTICLE—UNLAWFUL RESALE BY THE PURCHASER —RECOVERY OF THE PURCHASE PRICE.—*Graves* v. *Johnson,* 60 N. E., 383 (1901).—Intoxicating liquor was sold in Massachusetts by the plaintiff to defendant, the plaintiff knowing at the time that the defendant meant to resell the liquor in contravention of the Maine liquor laws. Nothing further than mere knowledge was proven against the plaintiff. He neither expressly agreed that the article should be unlawfully disposed of, nor did any act, other than making the sale, in aid of the defendant's

unlawful intention. Under such facts he was allowed by Judge Holmes to recover. The opinion of the court was to the effect that had there been a communicated desire of the plaintiff's to co-operate with the defendant's present intent, as distinguished from an understood indifference to everything beyond an ordinary sale in Massachusetts, the plaintiff could not have recovered. The opinion also suggested that, as in the case of attempts, the line of proximity might vary according to the gravity of the evil apprehended. How such a suggestion has been touched upon by other courts will be pointed out later.

The question involved in this case is an interesting one and has caused some conflict in authority.

An earlier Massachusetts case states the rule to be, that if the contract was made *with a view* to the subsequent unlawful disposition of the goods, the seller cannot recover. *Webster* v. *Munger,* 8 Gray, 587 (1857). Holmes cited the case with approval and seemed to think the rule amounted to the same thing as saying that if the plaintiff expressly agreed, or communicated a desire that the unlawful act should be done, there should be no recovery. The case was an opinion upon a contract in violation of a prohibitory Massachusetts statute, which may have led to the somewhat narrower statement of the seller's rights. As showing how trivial a circumstance will prevent a recovery, it appears from the case that "in one of the written orders, the illegal purpose for which the liquor was wanted, and the time when it would be wanted for that purpose, were indicated, and the plaintiff was urged not to fail in forwarding it to that end." The objection that if mere knowledge at the time of sale be the criterion, the plaintiff will be refused a recovery even though the defendant should change his mind and not carry out his unlawful purpose, would apply to the facts in *Webster* v. *Munger.* Yet there a recovery was denied.

The rule laid down in the principal case, that mere knowledge of the illegal act is not enough to prevent a recovery, while one of general application in the United States, is no longer the law in England. It was once the law there and it might be of interest to trace briefly the history of the change. The leading case is *Holman* v. *Johnson,* Cowp., 341 (1775), in which the plaintiff, a resident of Dunkirk, completed in that place a contract for the sale of goods, knowing that the defendant intended to smuggle them into England. In a suit for the price Lord Mansfield allowed him to recover. "If the defendant had bespoke the tea at a certain price, and the plaintiff had had any concern in running it to England, he would have been an offender against the laws of this country." A distinction was drawn between offences *mala in se* and *mala prohibita,* the opinion leaning to the view that had the former been assisted by the sale, the decision would have been otherwise. In 1767 Mansfield had made

the distinction and allowed a recovery on a bond given to secure the plaintiff for money advanced by him in unlawfully compounding differences in stock jobbing transactions: *Faikney* v. *Reynous,* 4 Burr., 2069. The cases of *Biggs* v. *Lawrence,* 3 Term R., 454 (1798); *Clugas* v. *Penalimas,* 4 Term R. 466 (1791); *Waymell* v. *Reed,* 5 Term R., 599 (1794), all revenue cases, in which the plaintiffs were non-suited, have been much relied upon in later English cases as over-ruling *Holman* v. *Johnson.* But in each case, in addition to knowledge of the purchaser's criminal intent, the plaintiff did some act to facilitate the smuggling of the goods. In 1835, in a case with practically the same facts as *Holman* v. *Johnson,* Lord Abinger gave judgment for the plaintiff. *Pellecat* v. *Angell,* 2 Crompt. Mees. & Rosc., 313. These revenue cases should perhaps stand in a group by themselves. Mansfield took the view that the plaintiff did not have to pay very high respect to the revenue laws of England. He probably had in mind the rigorous revenue system of the Continental countries.

A strong case is that of *Barjeau* v. *Walmly,* Str., 1249 (1795). Plaintiff and defendant were playing at tossing up for five guineas a throw. Defendant lost all his ready money and plaintiff loaned him £120, quickly winning it back again. Upon refusal to pay the bets, plaintiff was given judgment. This case is overruled in England and would not be generally followed in this country. In *Pearce* v. *Brooks, L. R.,* 1 Ex., 213 (1866), a contract to sell a prostitute a brougham, with knowledge of her calling, was held void for immorality. Nothing more than mere knowledge was required to be shown. It was argued that the defendant must prove the plaintiff's design and expectation of being paid out of the proceeds of her calling, but the court held such proof unnecessary. Pollock stated the rule broadly. "I have always considered it as settled law that no person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, can recover the price of the thing so supplied; nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causa non oritur actio.*"

The case is based on *Lightfoot* v. *Tenant,* 1 Bos. & Pull., 551 (1796); *Cannan* v. *Bryce,* 3 B. & A., 179 (1819), and *McKinnell* v. *Robinson,* 3 M. & W., 434 (1838). In considering the principle established by these cases, the opinion of the court which laid down the New York rule is worth quoting. "It was the *express object* of the plaintiffs in these cases, in selling goods or lending money, that they should be used for the unlawful purpose, and that such purpose entered into and formed a part of the sale or loan." In the first it appeared that the goods were sold *in order that* they should be shipped without license in vio-

lation of law; in the second, money was loaned for the *express purpose* of carrying out an illegal stock transaction; in the third, money was loaned for the purpose of playing an illegal game of hazard. If there is anything in the distinction made by the New York court, it would seem that the case of *Pearce* v. *Brooks* stands alone in English law as holding that mere knowledge is enough. See *Tracy* v. *Talmage,* 14 N. Y., 162 (1856). The distinction was recognized, and doubt thrown on *Pearce* v. *Brooks* in *Hill* v. *Spear,* 50 N. H., 253 (1870), where Judge Foster, in a long and well-considered opinion, exhaustively reviewed the authorities. In that case the vendor had solicited orders for the sale of liquor in New Hampshire, where the sale was prohibited, and had then completed the contract of sale in New York. It was held that the soliciting and knowledge of the illegal sales would not prevent recovery. The following rule was stated: That if there was active participation, to a greater or less extent, in the subsequent unlawful disposition or if an expectation of profit or advantage from the unlawful disposition entered as an essential ingredient into the original contract of sale, and induced it, there could be no recovery. The three cases relied upon by *Pearce* v. *Brooks,* came, in the mind of the court, under the second branch of the rule. The distinction between *malum prohibitum* and *malum in se* was rejected. Some emphasis was laid on the fact that the contract was valid in New York, the laws of which the court felt bound to respect so long as their enforcement did not gravely endanger the welfare of New Hampshire. The contract between this view and that of Mansfield's on the revenue laws (*Holman* v. *Johnson*) *supra,* is interesting to note. The distinction between *malum prohibitum* and *malum in se* was obliterated as far back as 1801 in *Aubert* v. *Maze,* 2 B. & P., 371, in which the case of Faikney & Reynous was questioned. To the same effect *is Cannan* v. *Bryce, supra,* and *U. S. Bank* v. *Owens,* 2 Peters, 517 (1829).

Whether, as suggested by Judge Holmes, the line of proximity may vary according to the gravity of the offense apprehended, has received an answer from the cases. The discussion turns upon a hypothetical case put by Eyre, C. J., in *Lightfoot* v. *Tenant, supra.* If a druggist sells arsenic, knowing at the time that the buyer intends to poison his wife, the law would give him no remedy. Nor would it to a person who sells drugs, knowing that they are to be so mixed as to make beer contrary to an act of Parliament. Though one offence is graver than the other, "the body of the color is the same in all." In considering these two transactions a Kentucky judge makes an important suggestion. Where the intention is to commit murder, treason, or violations of the fundamental rights of man and of society, Eyre's conclusion should be followed. Where, however, the intention is to buy an article and make a fraudulent use of it; to borrow money

to gamble with or to reloan at illegal rates of interest; to buy goods in the regular course of business and smuggle them into a foreign country; in which cases "the citizen may be neutral without being guilty of incivism," knowledge alone, unaccompanied by an express understanding, or acts in aid of the illegal purpose, will not invalidate the contract: *Steele* v. *Curle,* 4 Dana, 381 (1836). Followed in *Bickel* v. *Sheetz,* 24 Ind., 1 (1865), where the vendor in cases involving great moral turpitude is said to be an accessory before the fact.

Suppose we admit the law to be that knowledge of a present intent to do an illegal or immoral act will make the contract void. And also say, as was decided in *Pearce* v. *Brooks,* that such knowledge will be presumed from the nature of the article sold and the nature of the buyer's calling. Then, if by reason of a change of mind, the contemplated act is not done, there can nevertheless be no recovery. Moreover, a gambler or a prostitute, trusting to the notoriety of their respective callings and the plaintiff's ignorance of the law, may buy expensive furnishings and prosper, unmolested by suit. With regard to furnishing money or goods to a gambler, Judge Comstock in *Tracy* v. *Talmadge, supra,* gave the following opinion: "Money may be loaned in a gambling house for the specific purpose of staking it on the result of a game; the law says it cannot be recovered. But suppose a broker or a banker lends money in his office and in the regular course of his business, knowing his customer to be a gambler by habit, and believing that he wants the money for gambling purposes: if the illegal design does not enter at all into the negotiation of the contract, if it forms no part of the inducement of the transaction, will the knowledge or belief of the lender prevent him from recovering the money when it is due? Such a doctrine would be highly inconvenient in a commercial community."

In Pennsylvania, *Badgely* v. *Beales,* 3 Watts, 263 (1834). Gibson refused a recovery of wages on a contract to serve as marker at an illicit billiard table. He stated the rule broadly to the effect that any contract that aids or encourages, however remotely, a prohibited act is void. The force of the decision, however, is greatly lessened by *Braun* v. *Keally,* 146 Pa., 519 (1892), where, on facts very similar to the principal case, the contract was held valid.

NEGLIGENCE — UNLAWFUL ACT — INJURIES — INTERVENING CAUSE—EXCUSE.—*Osborne v. Van Dyke,* Supreme Court of Iowa, April 12, 1901.—A., an employe of B., was holding a horse belonging to B., while the latter was applying a wash to a galled place on the horse's neck. As the horse was nervous and restless it became necessary to put on him a twitch, which B. held with

the halter while the wash was applied. After removing the twitch, B. attempted to wash another spot, but the horse jumped aside, and struck B. Being angered, he began beating the horse with a heavy stick with a nail in the end, although A. tried to get him to desist. Finally B. slipped, and a blow aimed at the horse unintentionally struck A. in the face, breaking his nose and otherwise injuring him. The court instructed that the defendant would not be liable, if in beating the horse he exercised reasonable care to avoid striking the plaintiff, and the blow which inflicted the injury was caused by an accidental slip, for which the defendant was not to blame, and further, that this would be so even if defendant in beating the horse, was guilty of an unlawful act.

The Supreme Court held these instructions erroneous, because he overlooked the question as to whether it was negligence for defendant to strike the horse in the manner he did under the circumstances. If it was, he is liable for the natural and probable consequences of his act, even though the precise result which followed may not have been anticipated. "The fact that the accident was so unusual and extraordinary that it could not reasonably have been expected to happen, does not relieve defendant from effect of its negligence." (*Doyle* v. *Railway Co.,* 77 Iowa, 607. An "accident" may be defined as an event happening unexpectedly and without fault. Now the defendant here cannot be said to be without fault for the slip of his foot, if it grew out of or resulted from his negligent act. "The fact that some other cause operated with the negligence of the defendant to produce the injuries complained of will not relieve him from liability, if the wrong concurring with such other cause was the proximate cause of the injury." (*Gould* v. *Scherneer,* 101 Iowa, 583.)

As to the question whether the act of defendant in whipping or striking his horse was unlawful, it is claimed by plaintiff that if defendant was engaged in the doing of an unlawful act which resulted in injury to plaintiff, such conduct would be negligence as matter of law. In doing the act, the defendant violated §4969 of the Code, which imposes a penalty for cruelty to animals. "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events." I Add. Torts, 7. In *Messenger* v. *Pate,* 42 Iowa, 443, the court announced the following rule of law: "Whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another caused by such violation is the subject of an action; and it is sufficient to allege the violation of the law as the basis of the right to recover, and as constituting the negligence complained of." If the defendant was doing an unlawful act in beating the horse, he is liable for damages caused

thereby, and the subsequent accidental slip would not shield him. In opposition to this view the defendant cited the case of *Tingle* v. *Railway*. 60 Iowa, 333, where plaintiff sought to recover damages for the death of a cow at a place where the public highway crosses the railroad track. The company was unlawfully operating its trains on Sunday in violation of provisions of the Code, but it was held that the railroad company is not liable for the injury in the absence of negligence on the part of the company, or its employes. In this case, the unlawful act was a condition, but not a cause of the injury done, and there was no negligence involved, hence it is clearly distinguishable from the case at bar. It must appear then from the authorities cited that the defendant is clearly liable for his negligence, and is not excused from its consequences, by the so-called intervening accident.